Office - Supreme Court, U.S.
FILED
MAR 16 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-2162

In The

Supreme Court of the United States

October Term 1981

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION CO., INC.,

Appellants,

vs.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee.

On Appeal from the Court of Appeals of the State of New Mexico

BRIEF OF THE STATES OF MONTANA, ARIZONA, NEVADA, WASHINGTON, MINNESOTA, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF THE STATE OF NEW MEXICO

March 15, 1982

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INTERESTS OF AMICI

Pursuant to Rule 36 of the Supreme Court Rules the States of Montana, Nevada, Arizona, Washington, Minnesota, and South Dakota file this brief as *amici curiae* in support of Appellee.

The States which join in this brief have within their borders large Indian reservations and significant numbers of Indian citizens.[1]

Tribal members and non-members live on each reservation. Tribes and tribal members enter into innumerable business transactions with non-members and non-Indian entities. In recent years, the Indian tribes located within the *Amici* states have increased their economic activities on their reservations. At the same time, the tribes have also increased their business relations with non-Indians both on and off the reservation. This presents numerous actual and potential problems.[2]

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1. For example, the State of Montana has seven Indian reservations which together comprise 5.5 per cent of the total land within Montana. There are approximately 5,148,000 acres of tribal land and allotted individual land. T. Taylor, *THE STATES AND THEIR INDIAN CITIZENS*, 179 (1972).

There are twenty-three Indian reservations in the State of Washington. School population figures show that as of October 1, 1980, the total number of Indian students in the State's K-12 public school system numbered approximately 19,641. Of this number, approximately 13,395 resided on Indian Reservations.

Arizona has the largest population of reservation Indians of any state of the Union. Nearly one-third of all Indian Trust lands in the United States lie within the State of Arizona, covering nearly twenty million acres, or almost 27 per cent of the State's area. The two largest metropolitan areas in Arizona, Phoenix and Tucson, lie in close proximity to, and in certain areas are adjacent to, Indian reservations.

2. One example of such a problem in Arizona is representative. There, in mid-1981, it was announced that a combination retail-industrial project with an estimated cost of 400 million dollars was to be constructed on the Salt River Indian Reservation immediately east of the Phoenix-Scottsdale area. Accompanying the announcement of the project was a representation that the persons who built upon the reservation or did business thereon would be exempt from State taxation.

All of the *Amici* have numerous non-discriminatory taxes which are imposed upon all of their citizens, unless they are entitled to exemption. Since *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973), the States have recognized that reservation Indians, tribes, and tribal or trust lands, and certain kinds of personal property owned by the tribes or by individual Indians are exempt from taxation. The States, however, have consistently asserted their authority to tax non-Indians, including non-Indian entities doing business with tribes within the exterior boundaries of their reservations.

Since *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973), there has been a continuum of litigation in which the various Indian tribes have challenged the rights of the States to collect numerous taxes. Several of those cases have involved Indian tribes' contentions that the States may not collect taxes from non-Indian entities which are doing business with the tribes on their own reservations.[3]

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3. The State of Montana's pending cases include: *Crow Tribe of Indians, et al. v. State of Montana, et al.*, — F. 2d — (9th Cir. July 13, 1981), *petition for rehearing denied*, January 5, 1982. The Crow Tribe challenged Montana's authority to collect its coal severance tax (Montana Code Annotated [hereinafter M. C. A.] §§ 15-35-101 through 15-35-110) and gross proceeds from coal tax (M. C. A. §§ 15-23-701 through 15-23-704) from non-Indian coal producers mining off-reservation coal in which the tribe claims beneficial interest. The case has been remanded to the United States District Court for the District of Montana for trial in light of the opinion of the Ninth Circuit Court of Appeals. Over $35,000,000 in taxes are at stake.

Blackfeet Tribe of Indians v. Groff, et al., No. CV-78-61-GF (D. Mont. 1981), (pending 9th Cir. No. 81-3041). The Blackfeet

(Continued on next page)

The *Amici* States have a vital interest in any case involving the States' right to tax non-Indians doing business with Indian tribes. The case before this Court presents an opportunity for the Court to decide the question of whether States will be able to continue to impose any tax upon non-Indians doing business with Indians or Indian tribes on their reservation.

ARGUMENT

I.

The states must be allowed to impose their taxes upon non-Indians doing business with Indians.

The States must be allowed to continue to tax non-Indian property or activities within a reservation. This

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(Continued from previous page)

Tribe challenged the right of the State of Montana to impose its five oil and gas production taxes upon non-Indian producers leasing lands in which the Blackfeet Tribe has a beneficial interest. This case involves over $6,000,000 in taxes collected from producers pursuant to the Resource Indemnity Trust Tax, M. C. A. § 15-38-104, Producer's License Tax, § 84-2202 Revised Codes of Montana, 1947, Oil & Gas Severance Tax, M. C. A. § 15-36-101, M. C. A. Oil & Gas Conservation Tax, M. C. A. § 82-11-131, and Oil & Gas Net Proceeds Tax, M. C. A. § 15-23-601.

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, et al., v. The State of Montana, et al., (D. Mont. No. CV 81-8-GF). The Tribes challenge the right of the State of Montana to collect its sales tax for new motor vehicles, (M. C. A. §§ 61-3-502 and 61-3-303(2)(b)) and the motor vehicle personal property tax required for licensing vehicles in Montana, (M. C. A. §§ 61-3-503 and 61-3-504).

Court has recognized the right of a State to impose taxes upon and otherwise regulate the affairs of non-Indians doing business on an Indian reservation, this even when the person or property taxed or regulated had a direct connection with an Indian tribe and tribal property on reservation, and despite the fact that the tax had a direct economic impact upon tribal government or programs. *Thomas v. Gay*, 169 U. S. 264 (1898) (state could tax non-Indian owned cattle grazing on reservation); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation*, 425 U. S. 463 (1976) (state could require Tribes to collect tax on sales of cigarettes to non-Indians from tribally licensed "smoke shops"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980) (state could collect tax on sales of cigarettes to non-Indians and non-members of the Tribes).

Not only has this Court recognized the rights of states to impose their taxes upon non-Indians who do business with Indian tribes on reservations, but this Court has expressly limited the exemptions from state taxes to on-reservation enrolled members of a tribe living on their own reservation or to tribal or trust properties. *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U. S. 145 (1973); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U. S. 463 (1976); *Bryan v. Itasca County*, 426 U. S. 373 (1976); and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980). In each of these cases, this Court implicitly used the legal incidence test despite the fact that Indians and Indian property were involved. In each case this Court determined that the State was precluded

from exercising its otherwise valid taxation powers only in those situations where the incidence of the challenged taxes fell upon reservation Indians or their on-reservation property.

Appellants argue that the New Mexico Gross Receipts Tax creates an economic burden upon the Ramah Navajo School Board, and Appellants suggest that the incidence of the tax is shifted from Lembke Construction Co. to the Ramah Navajo. Such an argument is directly contrary to the clear, longstanding rule of this Court that passing on the *economic* burden of a tax to one who has no legal obligation to either pay the tax or reimburse the taxpayer does not shift the incidence of the tax to one who bears the burden. Certainly, liability for actual payment of the tax to a government does not always coincide with the legal incidence of the tax. However, legal incidence of the tax will fall upon the person or entity liable for actual payment of the tax except when the tax itself *clearly and unavoidably requires the taxpayer to pass the tax onto another. Alabama v. King & Boozer,* 314 U. S. 1 (1941); *United States v. City of Detroit,* 355 U. S. 466, 473 (1958); *American Oil Co. v. Neill,* 380 U. S. 451 (1965).

Historically, this Court has examined states' taxation schemes in order to determine whether or not the incidence of the tax involved shifted from the taxpayer to another. *First Agricultural Bank v. Tax Commission,* 392 U. S. 339 (1968); *United States v. Mississippi Tax Commission,* 421 U. S. 599 (1975). This Court has held that the legal incidence of a federal excise tax did not shift from the gasoline distributor to the consumer where "no statute *required* petitioner to pass the tax on to a purchaser-consumer." [Emphasis supplied.] *Gurley v. Rhoden,* 421

U. S. 200, 204 (1975). The legal incidence did not shift even though there was supplemental state law which "provided only that the excise tax *'may be passed on to the ultimate consumer. . . .'*" [Emphasis in original.] 421 U. S. 200, 206, n. 6.

The legal incidence test has long been used in non-Indian context because it provided the only mode of analysis yielding predictable, rational and workable results in challenges to tax statutes. It is the only method by which to identify what person or entity has an interest in the taxation sufficient to justify a complaint and obtain a remedy. When used in the Indian-related cases cited above, and in this case, the test is equally appropriate. This Court should reject the substitution of the economic burden test for the long used legal incidence test.

II.

The abandonment of the legal incidence test in Indian cases yields absurd results.

In recent years, there has been a concerted attempt by Indian tribes to eliminate the use of the legal incidence test by arguing that, although the incidence of a challenged tax might fall upon a non-Indian who actually paid the tax, the tax was nonetheless invalid. A frequently used argument was that the economic effect of the tax devastated tribal revenues, and thus interfered with tribal self-government. The economic effect, it was argued, somehow shifts the incidence from the taxpayer to the tribe which was detrimentally affected. The second argument was that the existence of a tribal tax preempted the authority of a state to tax the same product or activity. Finally, it was argued that the existence of federal regu-

lations pertaining to a certain activity defeated the authority of the state to impose any tax upon the regulated activity. These arguments were most extensively considered by this Court in *Washington v. Confederated Tribes of the Colville Indian Reservation, supra.* After explicitly finding that the challenged taxes fell upon the non-Indian purchaser of cigarettes this Court rejected the attempt of the Tribes to avoid the legal incidence test. Instead, this Court upheld the right of the State of Washington to impose taxes upon non-Indian consumers of cigarettes, notwithstanding the devastating economic effect upon the tribal revenues, and notwithstanding the existence of tribal cigarette taxes, which the Tribe argued had been federally approved and therefore constituted a federal preemption.

In the case before this Court, the Ramah Navajo School Board and Lembke Construction Company, as well as the United States by its memorandum as *amicus curiae,* all seek to have this Court read the single case of *White Mountain Apache Tribe v. Bracker,* 448 U. S. 136 (1980) to undo the traditional tax analysis of previous years, and to extend unprecedented tax immunities to non-Indians doing business with Indian tribes. *Bracker* neither overruled the previous cases nor reconciled them in its analysis. Appellants now ignore the unique factual circumstances of *Bracker* and rely upon broad language contained in the Court's opinion in *Bracker* to yield absurd results.[4]

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4. As is argued in part III of this brief, Bracker also troubles both the United States and *Amici* States because it requires constant judicial weighing of competing interests of the United States, the Tribes and the States.

The arguments made by the United States and by appellants in this case would inevitably deprive the states of their rights to impose non-discriminatory taxes for purposes of general revenue raising, and would require the states to correlate every dollar of tax raised from any non-Indian doing business with an Indian tribe with every dollar of governmental expense incurred. This Court recently refused to require the State of Montana to enter into such dollar-for-dollar justification, and affirmed the state's right to a general revenue raising tax. *Commonwealth Edison Company v. Montana*, — U. S. —, 69 L. Ed. 2d 884, 897-898 (1981). The Court observed:

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled to is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 521-522 (1937), 81 L. Ed. 1245, 57 S. Ct. 868, 109 A. L. R. 1327 (1937) (citations omitted).

Clearly, the non-Indian business, such as Lembke Construction Company, has substantial off-reservation connections. The mere fact that some of Lembke's business occurred on a reservation and was the result of a contract with an Indian tribe should not relieve Lembke from paying the taxes which make an organized society possible.

A second absurd result of the interpretation of appellants and the United States is that those who do business

with Indian tribes are exempt from state taxes, while those who do business with the United States government must pay the same taxes. For instance, the New Mexico Gross Receipts Tax, at issue in this case, has been held to be validly collected from contractors who do business with the United States. *United States v. State of New Mexico*, 581 F. 2d 803 (10th Cir. 1978).[5] Under that case, if the contract for the construction of the school were let by the United States or the Bureau of Indian Affairs, the gross receipts tax unquestionably would be due from Lembke Construction Company. This Court should not allow evasion of the tax merely because an Indian tribe is the contracting entity.

Finally, a decision of this Court upholding the arguments of the Ramah Navajo School Board and Lembke Construction Company, and the interpretation of the United States, would prohibit the states from imposing any type of tax on non-Indians with respect to their on-reservation business, the only possible exception being the tax on the type of activities in the *Colville* situation.

At issue in further litigation could be corporate license taxes and income taxes normally payable by non-Indian corporations which are incorporated under State law and do business on a reservation. Arguably, a non-Indian employee would not have to pay his individual income tax on earnings for his work for an on-reservation Indian employer. A non-Indian employer would not have to pay for unemployment compensation or worker's com-

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5. *See also, Kiewit v. State Board of Equalization*, 505 P. 2d 102 (1973); *Kiewit v. Department of Revenue*, 531 P. 2d 1327 (1975); *Montana v. United States*, 440 U. S. 147 (1979).

pensation for his employees, if they were working on activities on behalf of an Indian tribe on-reservation. A logical extension of appellants' arguments means that non-Indians could evade all taxes to which they were otherwise subject in the various states by entering into contracts with an Indian tribe.

The *Amici* States submit that these predictable results are absurd and avoidable. This Court should continue to use the legal incidence test and provide both Tribes and States with rational, fair results.

III.

The Indian Commerce Clause cannot be expanded to prohibit state taxation of non-Indians doing business with Indian tribes.

The United States, in part B of its brief as *amicus curiae*, suggests that there is an actual and potential unique sort of disarray and misunderstanding among the state courts and lower federal courts concerning state authorization to tax and regulate activities or transactions within an Indian reservation. The United States uses this starting point to propose that this Court "straighten out" the past confusion and guarantee future clarity by using an expansive application of the Indian Commerce Clause (U. S. Br. 17-24). *Amici* States agree that the judicial weighing of the competing interests of the States, the Tribes and the United States is completely unsatisfactory.[6] The States, however, disagree that the proper

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6. We realize, of course, that the Court has recently taken this balancing function upon itself, as exemplified in *White Mountain Apache, supra,* and *Central Machinery v. Arizona Tax Comm.*, 448 U. S. 160 (1980), under the rubric of a "particularized inquiry." But that is precisely what has created the problem which we and the United States agree should be solved.

solution to this unsatisfactory approach could be created from the "modest proposal" (U. S. Br. 18) by the United States to use an expansive application of the Indian Commerce Clause.

At one period in our history the proposed expansive application of the Indian Commerce Clause may have made complete sense; dealings between Indians and non-Indians would be completely "off limits" to state regulatory power, including state taxing power. During that period, which extended roughly through the first three quarters of the Nineteenth Century, federal policy was to isolate Indians from non-Indians, by means of the reservation system. At that time the inhabitants on those reservations were, both in law and in practice, the exclusive responsibility of the federal government, not the States. Thus, as pointed out by the United States (U. S. Br. 21) this Court could reasonably state in 1866 that "there can be no divided authority" between federal and state governments in Indian affairs. The *Kansas Indians*, 72 U. S. (5 Wall.) 737 (1866).

Congressional policies to divide tribal lands into individual allotments, thereby furthering congress' assimilationist policies at the last quarter of the Nineteenth Century, culminated in the General Allotment Act of 1887, 25 U. S. C. §§ 331-358. That Act contemplated complete termination of the reservation system, elimination of federal responsibility for Indians, and subjection of Indians to state law in the same manner as everyone else once they received unrestricted title to their allotments. Since 1887 there have been numerous reversals and counter-reversals in federal policy. Despite such changes in federal policy, however, one part of the assimilationist policy

has remained unchanged, and in fact was reaffirmed and actually speeded up in 1924. Indians were to be citizens of the United States and therefore of the States in which they reside, regardless of the status of their land holdings, in the Indian Citizenship Act. Act of June 2, 1924, 43 Stat. 253, 8 U. S. C. § 1401 (a) (2).

This has important consequences. What the United States characterizes as a "wall" which New Mexico is attempting to breach in this case (U. S. Br. 23) is not really a wall at all, but a *filter*. By reason of the Equal Protection Clause of the Fourteenth Amendment, both Indians and non-Indians, even when on a reservation, are entitled to all of the benefits of State law to which citizens outside the reservation are entitled. It is only the burdens imposed by state law which are screened out.

The best illustration of the operation of this "filter" is found in the field involved in this litigation, Indian education. The legal situation has been well summarized by one commentator as follows:

> Legally, the states, rather than the federal government, have the duty to provide education services for Indian children. The Supreme Court has ruled emphatically that the opportunity for public education, "where the state has undertaken to provide it, is a right which must be made available to *all* on equal terms." Indian children, as citizens of the state in which they reside, are entitled to a free public education to the same extent as other citizens. It has long been held by both state and federal courts that the provisions of Indian schools by the Bureau of Indian Affairs does not justify the exclusion of Indian children from public schools. Nor do the Indian treaties impose on the federal government a generalized responsibility for the education of Indian children.

> [Footnotes omitted.] Rosenfelt, *Toward a More Coherent Policy for Funding Indian Education*, 40 Law and Contemp. Prob. 190, 194 (1976).

The practical results flowing from this legal situation are as one would expect:

> About 80 per cent of the 350,000 American Indian school children attend public schools. At least half of these children attend schools funded in large measure by local property taxes. However, the remaining half attend schools in 'reservation' districts containing blocks of Indian land held in trust by the United States and exempt from real property taxation. Accordingly, in reservation districts the federal government provides Impact Aid funds in lieu of local property taxes and special assistance for school construction. Rosenfelt, *supra*, at 192.[7]

In education, then, as well as in other areas of state services, such as public health, public assistance or other welfare programs, it is simply untrue that the States have "no duties or responsibilities respecting the reservation Indians," and *White Mountain Apache Tribe v. Bracker*,

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7. The problem of local school districts with low levels of taxing resources is not unfamiliar to this Court. See, *Rodriquez v. San Antonio School District*, 411 U. S. 1 (1972). The tax immunities enjoyed by Indians and their lands simply exacerbate this problem for reservation school districts. To the extent, however, that a state equalization system eliminates that problem, it reduces the need for federal Impact Act funds. Many states have adopted such equalization systems. In Montana, for instance, 'Interest and Income Moneys' are derived from various sources set forth in 1972 MONT. CONST., Art. X, Sec. 2, and are placed into a general state wide fund. Ninety-five per cent of this income must be "equitably apportioned annually to public school districts," based on the number of students in the school and the number of days attended, regardless of the taxing resources of the particular school's district. 1972 MONT. CONST., Art. X, Sec. 5; M. C. A. §§ 20-9-341-344.

448 U. S. 136, at 152, is wrong on that point. That statement, which was first made in *Warren Trading Post v. Arizona Tax Commission*, 380 U. S. 685 (1965) remains erroneous. It is the Fourteenth Amendment itself which made it erroneous.[8]

The immunity of tribes and on-reservation tribal members living on their own reservation, of course should not be impaired. However, with respect to state taxation of on-reservation activities of non-Indians dealing with tribal members on their own reservations or an Indian Tribe, this Court should continue to apply the Indian Commerce Clause just as it has in the past, utilizing, for instance, the same sort of reasoning used in *Thomas v. Gay, supra.* There, this Court upheld a tax upon cattle of a non-Indian grazing on Indian lands pursuant to a lease with the tribe. This Court stated:

> It is further contended that this tax law of the territory of Oklahoma, insofar as it affects the Indian reservations, is in conflict with the constitutional power of Congress to regulate commerce with the Indian tribes. It is said to interfere with, or imposes

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8. The United States in its statement of the Question Presented, in its heading for the Argument, and in the argument itself suggests that New Mexico has "relinquished" its responsibility for educating the children attending the school involved in this case. (U. S. Br. (i), 9; *cf.* also p. 23). The suggestion is highly misleading. A state cannot relinquish its Fourteenth Amendment responsibilities; and those responsibilities include the education of Indian children. Indian parents and tribal leaders may well believe—and quite correctly in many cases—that with federal funding they can provide a better education than the state provides, for reasons discussed in the article quoted above. But in this they are in essentially the same situation as the parents of children who choose to send their children to a private school, the only difference being that Indian parents do not have to shoulder the financial responsibility for the school.

> a servitude upon, a lawful commercial intercourse with the Indians, over which Congress has absolute control, and in the exercise of which contract it has enacted the statute authorizing the leasing by the Indians of their unoccupied lands for grazing purposes.
>
> The unlimited power to Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a state or territory, of property of others than Indians would be an interference with Congressional power. . . . 169 U. S. at 274.

Such an application of the Indian Commerce Clause would yield results and tests which are consistent with those which have always been applied when taxable entities or individuals who do business with a non-taxable entity, such as the federal government or a tax-exempt organization. In other words, in like cases, the federal government, Indian tribes, individual on-reservation tribal members, or a tax-exempt organization, would remain immune from taxes. The private non-Indian party doing business with these entities would be presumptively taxable. This presumption, then, would be overcome only by a *clear* expression of congressional intent that those non-Indian parties doing business with the federal government or an Indian Tribe should also be immune from taxation.[9]

These parallel tests would place tribal government in the same position as the federal government. The proposal of the United States, in contrast, would actually

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9. This proposed solution to the problem presented by the "particularized inquiry" approach is similar to that of the United States, in that it relies heavily upon the use of a presumption. Our presumption, however, is just the opposite of that suggested by the United States.

place Indian tribes in a position superior to the United States with no congressional, constitutional or treaty warrant for doing so. There is no justification for adopting an approach so inconsistent with the approach used in any other comparable situation.

There is a final problem with the United States' proposal for the expansion of the Indian Commerce Clause. Under the guise of an interpretation of the Indian Commerce Clause, this proposal would resurrect the "intergovernmental immunity doctrine [which] was once much in vogue in a variety of contexts," including the context involved in this case, taxation of those doing business with Indian Tribes. *Mescalero Apache Tribe v. Jones, supra,* 411 U. S. at 150. In *Mescalero,* this Court traced the rise and fall of this doctrine, as applied both to the federal government and to Indian tribes, 411 U. S. 150-155, and concluded by stating:

> "We accordingly decline the invitation to resurrect the expansive version of the intergovernmental-immunity doctrine that has been so consistently rejected in modern times. 411 U. S. 155.

The proposal of the United States is, at bottom, a similar invitation which should also be declined.

IV.

The Jicarilla decision recognizes the States' continued power to tax non-Indians.

On January 25, 1982, this Court decided *Merrion v. Jicarilla Apache Tribe,* — U. S. — (50 U.S.L.W. 4169) (1982). Its holding is clear: in the context of tribal severance taxes imposed with respect to oil and gas production activities occurring wholly upon Indian reservation trust lands, Indian tribes possess as an inherent attribute

of their tribal sovereignty the power to tax non-Indians doing business with Indian tribes within the territorial limits of their reservations. The holding is also clear that the States continue to have the power to tax non-Indians doing business with Indian Tribes, even when the tribe taxes the same activity.

The *Jicarilla* opinion is couched in terms which not only recognize the authority of Indian tribes to impose their taxes upon non-Indians under certain circumstances, but also recognize the continuing authority of the States to tax in like fashion. For example, through numerous citations in the opinion to the prior decision in *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134 (1980), this Court rejected the non-Indian petitioners' argument that Congress had divested the tribes of the power to tax non-Indians by conferring that power upon the states. Indeed, the *Jicarilla* opinion specifically quotes from the *Colville* decision (447 U.S. at 158 (*Jicarilla* Slip Op. at 20):

> "'There is no direct conflict between the state and tribal [taxing] schemes, since each government is free to impose its taxes without ousting the other.'"

In further support of the proposition, the Court noted (*Jicarilla* Slip Op. at 19-20) that the mere existence of State authority to tax does not deprive the Indian tribe of its power to tax, citing *Fort Mojave Tribe v. County of San Bernardino,* 543 F. 2d 1253 (9th Cir. 1976), *cert. denied* 430 U.S. 983 (1977).

It is significant that the Court in *Jicarilla* cites *Commonwealth Edison v. Montana,* — U.S. —, 1015 S. Ct. 2946 (1981) to show two things: (1) the firm and unquestioned power of a sovereign such as a State to tax for general

revenue raising purposes,[10] and (2) the minimal contacts which must exist between the taxed entity and taxing authority. The record in this case shows that Lembke Construction Company is a New Mexico corporation, doing business within the State, with its base in Albuquerque. Its business is conducted predominently off-reservation. The contacts between the State of New Mexico and the Lembke Construction Company are at least as significant as those which existed between the State of Montana and the utilities in *Commonwealth Edison.* Thus, the rationale of the *Jicarilla* decision supports the continued power of the States to tax non-Indians who perform otherwise taxable activities on Indian reservations.

CONCLUSION

The *Amici* States recognize that Indian tribes and their on-reservation property are in most situations tax exempt. If this Court accepts appellants' arguments, founded primarily on *Bracker,* the Court will give non-Indians a magic wand which may be used when they do business with an Indian tribe. Upon touching the wand, the non-Indian, otherwise subject to all taxes and costs of doing business within the State, changes into a tax exempt entity.

In addition, the suggestion of the United States that the Indian Commerce Clause be expansively applied, which the United States argues will provide a panacea for all future questions in this complex area of the law, is mere sleight of hand which should be rejected.

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10. Amici acknowledge that the Court in *Jicarilla* compares that unquestioned power of the State of the tribes to tax non-Indians under certain circumstances.

The decision of the Court of Appeals of New Mexico should be affirmed.

Respectfully submitted,

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